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No. 654

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, PETER F. HEIN, LAWRENCE F. SULLIVAN AS AND CONSTITUTING THE BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Petitioners,

v.

THE WOOD PRESERVING CORPORATION,

Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONERS

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Petitioners,

v.

THE WOOD PRESERVING CORPORATION,

Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' BRIEF

I

The Opinion of the Court Below

The opinion of the Circuit Court of Appeals in *Wood Preserving Corporation* v. *Department of Treasury of Indiana* was rendered on July 20, 1940, and is reported at

114 Fed. (2d) 922; it is also reproduced in the Record at pages 70 to 83. The petition for rehearing was overruled on October 5, 1940, as appears in the Record at page 84. (This court granted the writ of certiorari on February 3, 1941.)

II

Statement of the Case

This action, originally instituted in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and thereafter appealed to the United States Circuit Court of Appeals for the Seventh Circuit, the same being Cause No. 7126 in said Circuit Court of Appeals, was an action to recover taxes collected by the petitioners under the Indiana Gross Income Tax Act of 1933 (Chap. 50, Ind. Acts 1933, Burns Indiana Statutes Annotated, 1933, Sec. 64-2601, et seq. Baldwin's Indiana Statutes, 1934 Ed. 15981 et seq.).

The petitioners herein were successful in the District Court. An appeal was taken by The Wood Preserving Corporation resulting in a reversal of the decision of the District Court. 114 Fed. (2d) 922. The writ of certiorari was granted by this court on February 3, 1941.

The Facts

The facts in the case were largely stipulated, and the District Court adopted them with some rather minor additions, as his findings of fact. They may be summarized as follows:

a. Respondent, The Wood Preserving Corporation, is organized under the laws of the State of Delaware, and is engaged in the business of producing, purchasing and

selling ties and timber. Its principal place of business is at Pittsburgh in the State of Pennsylvania. However, it maintains an office at Marietta, Ohio, at which offers to purchase untreated cross-ties were received via telephone from the purchasing agent of the Railroad Company at Baltimore, Maryland (F. 8(d), R. 38, ll. 26-34). It is qualified to do business in Indiana (F. 1, R. 20, ll. 35-45), but maintains no office there other than an office in the City of Indianapolis for the service of process and, in addition thereto, normally had one agent or employee assigned to the Indiana territory who was engaged in the buying of ties and was responsible to the respondent's Marietta office. In addition, respondent's District Manager of Production and Operation, with his headquarters at respondent's Marietta, Ohio, office made periodical trips to Indiana to interview people with whom respondent did business, in relation to complaints, giving them assistance, and to handle other matters that were beyond the authority of the field man's normal scope (F. 11, R. 48, ll. 28-41).

b. The Railroad Company, by telephone calls from its purchasing agent at Baltimore, Maryland, advised a representative of the respondent at its office at Marietta, Ohio, of the ties to be required by the Railroad and the price which it was willing to pay f. o. b. cars at loading point (F. 8(d), R. 38, ll. 26-32).

c. Subsequent to the receipt of the telephone order from the purchasing agent of the Railroad, the respondent prepared and mailed to known producers of cross-ties in the State of Indiana and elsewhere, a price list stating the size, quality, and kind of ties which respondent would accept at loading points along the right-of-way of the Baltimore & Ohio Railroad, and the prices which it would

pay for such ties (F. 8(d), R. 38, ll. 35-41). The circular so prepared by the respondent contained the following provisions:

> "The above prices are on the ground and we pay additional for loading to cars.
> "Our inspectors make immediate payment by sight draft at time of inspection."
> R. 39.

> "When ties are piled at loading points on the B. & O. Railroad according to the above and our specifications, each pile should be marked with a tag on which is written 'For The Wood Preserving Corporation' and the owner's name and address."
> R. 39.

> "Each stack shall have fastened to it a tag on which is written, 'for The Wood Preserving Corp.' the owner's name and address, the date when stacked, and the number of ties of each kind of wood in the stack."
> R. 43.

d. Producers having available supplies of ties and being willing to furnish the ties at the prices stated in respondent's price list, would notify by mail, wire, or phone, the Marietta office of the respondent, or respondent's agent would make such arrangements with producers in Indiana (F. 8(d), R. 44, ll. 17-24).

e. When the ties were ready at a loading point, an inspector of the respondent and an inspector of the Baltimore & Ohio Railroad Company would go to the loading point, and all ties accepted by the Railroad's inspector were loaded by the producer on cars of the Railroad. Ties rejected by the Railroad inspector were not loaded on cars or paid for by the respondent (F. 8(d), R. 44, ll. 30-36).

f. A shipping report was made out by the respondent's agent, and one copy sent to the respondent's Marietta office and one to the National Lumber and Creosoting Company at Finney, Ohio (F. 8(d), R. 44, ll. 37-40). Also at the end of each day the Railroad inspector prepared an inspection report of the ties accepted, and furnished a copy of the report, in duplicate, to respondent's inspector. Upon the basis of this inspection report, respondent's inspector, by drafts on banks outside of the State of Indiana, settled with the producer for the ties accepted at the points of loading within Indiana. The amount of the drafts was predicated upon the price lists, plus the loading charges above referred to, if any (F. 8(d), R. 45, ll. 13-21).

g. All of the ties originating in Indiana were delivered to the Railroad Company f. o. b. cars at points of origin within Indiana (F. 9, R. 48, ll. 1-4).

h. The respondent's agent, while within the State of Indiana, forwarded the following:

1. One copy of the shipping report prepared by respondent's agent to the respondent's Marietta office (F. 8(d), R. 44, l. 37, to R. 45, l. 12).

2. One copy of shipping report of respondent's agent to National Lumber and Creosoting Company at Finney, Ohio (F. 8(d), R. 44, ll. 36-40).

3. One copy of shipping report of respondent's agent to the Baltimore, Maryland, office of the Railroad Company (F. 8(d), R. 45, ll. 25-29).

4. One copy of the respondent's draft used in paying the producer, to the respondent's Marietta, Ohio, Office (F. 8(d), R. 45, ll. 21-25).

5. One copy of the railroad inspector's report to respondent's Marietta office (F. 8(d), R. 45, ll. 21-25).

6. One copy of the billing of cars to the Baltimore, Maryland, office of the Railroad Company (F. 8(d), R. 45, ll. 25-29).

i. At the end of each day's loading of ties along the right-of-way of the Railroad in Indiana, the ties were billed by the respondent's agent in the name of The Wood Preserving Corporation, to the Baltimore & Ohio Railroad Company in care of the person who was at the time chief engineer of maintenance of the Railroad Company stationed at Finney, Ohio (F. 11, R. 48, l. 42, to R. 49, l. 2). The respondent paid no freight to the Railroad Company for transporting to Finney the ties so loaded in Indiana and billed to the Railroad Company as above stated (F. 11, R. 49, ll. 5-8).

j. At the end of each week the respondent's Marietta office prepared an invoice against the Railroad Company for ties inspected, reported, sold, and delivered to the Railroad Company during the previous week, as shown by the inspection reports, and forwarded this invoice to the Baltimore, Maryland, office of the Railroad Company (F. 8(d), R. 45, ll. 29-37).

k. Payments to the respondent for the untreated ties so furnished were made in the regular course of business by the Baltimore & Ohio Railroad by checks drawn on banks located in cities outside of the State of Indiana, mailed to the respondent's Pittsburgh, Pennsylvania, office, and deposited there (F. 8(d), R. 47, ll. 5-10).

l. All of the ties originating in Indiana during the years of 1934, 1935, and 1936, which were sold to the Railroad Company by the respondent were delivered to the Railroad Company f. o. b. cars at points of origin within Indiana, and were carried by the Railroad Company from the points of origin in Indiana to the National Lum-

ber & Creosoting plant at Finney, Ohio (F. 9, R. 48, ll. 1-11). These ties were transported to the Finney, Ohio, treating plant for the purpose of having the same treated and no freight charges were paid to the Railroad Company for transportation of said ties from points of origin in Indiana to the Finney plant (R. 49).

III

Specification of Errors

The contested issues are as follows:

1. Whether the taxes herein sought to be recovered are valid within the purview of the due process clause of the Fourteenth Amendment to the Federal Constitution. The petitioners contend that the taxable event as respects respondent, a non-resident of the State of Indiana, is the fact that said respondent is engaged in business within the State of Indiana, and derives gross income from sources within the State of Indiana.

2. Whether the taxes herein sought to be recovered are valid within the purview of the due process clause of the Fourteenth Amendment to the Federal Constitution. The petitioners contend that the gross receipts which were the measure of the tax assessed and collected were derived from a source entirely within the State of Indiana, and that there was no evidence adduced before the United States District Court, and no finding of fact, which shows that the gross receipts derived from the sale of raw ties in Indiana were either in whole or in part derived from a source outside the State of Indiana.

3. Whether the taxes herein sought to be recovered were improperly assessed and collected in violation of

the commerce clause, Article I, Section 8, of the Federal Constitution. The respondent's claim is that such taxes are laid upon receipts derived from interstate commerce, that they constitute a direct burden on such commerce, and are of a type which subjects the commerce to the risk of multiple taxation of like kind in other states. The petitioners, on the other hand, contend that the receipts forming the measure of the tax are not derived from interstate commerce, that the tax does not constitute a direct burden on interstate commerce, and that such tax is not of a type which subjects the commerce to the risk of multiple taxation of like kind in other states on the sole ground that interstate commerce is being done.

IV

Summary of the Argument

One

The Act itself designates, in section 2 thereof, the taxable event, which in the case of the respondent, a non-resident of the State of Indiana, is engaging in business in the state or deriving gross income from sources within Indiana.* The respondent, a non-resident of Indiana, engaged in the business of purchasing, selling, and delivering untreated cross-ties within the State of Indiana. The taxable event on which the taxes were levied was wholly within the State of Indiana, and did not impinge upon the due process clause of the Fourteenth Amendment to the Constitution of the United States.**

*Sec. 2, Chapter 50, Indiana Acts 1933, p. 388 at p. 390;

**See: *Storen, etc., et al.* v. *J. D. Adams Mfg. Co.* (1937), 212 Ind. 343, 7 N. E. (2d) 941 at 946;

J. D. Adams Mfg. Co. v. *Storen* (1938), 304 U. S. 307 at 308, and at 310;

Also: *Miles, et al.* v. *Department of Treasury* (1935), 209 Ind. 172 at 178, 199 N. E. 372 at 378-379;

Indiana Creosoting Co. v. *McNutt* (1936), 210 Ind. 656, at 663, 664, 5 N. E. (2d) 310 at 313;

********Equitable Life Society* v. *Pennsylvania* (1915), 238 U. S. 143, 35 Sup. Ct. 829, 59 L. Ed. 1239;

Shriver v. *Pittsburgh* (1876), 66 Pa. 446;

F. 1, R. 20, ll. 33-34; F. 8(d), R. 47, ll. 22-24; F. 9, R. 48, ll. 1-4; F. 11, R. 49, ll. 32-36.

Two

In holding, upon the evidence already summarized, that "a sizable portion of the business affording the source of income, was transacted outside of the State of Indiana both before and subsequent to the actual delivery of the ties to the Railroad," thereby concluding that the state had no jurisdiction to tax in the absence of an apportionment, the Circuit Court of Appeals has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Dravo Contracting Company* v. *James*, reported in 114 Fed. (2d) at p. 242, certiorari denied, January 14, 1941. It would appear from the opinion of the Circuit Court of Appeals for the Seventh Circuit in the present case that the "sizable portion of the business affording the source of income" to which the opinion refers is the bookkeeping, invoicing, and general office activities of the respondent which were carried on outside of the state; however, it seems apparent that these were not income-producing activities and that they are not, in the true sense, the

source of the respondent's income used as a measure of this tax.

The *source* of respondent's income derived from the sale of tangible property is the tangible property itself, and the source of the income is not affected by the place at which the incidental items of bookkeeping, invoicing and office transactions took place.

Three

The total receipt which was the measure of the tax was derived from business engaged in and from a source within Indiana: For all of the gross income used as the measure of the tax represented the purchase price of the raw, untreated cross-ties which respondent acquired, sold, and delivered in Indiana. The purchaser did not purchase or pay for anything other than the raw, untreated cross-ties delivered to it in Indiana, and more particularly did not pay for any manufacture or fabrication in another state, nor purchase additional performance by respondent of any part of the sales contract in another state. There can be no question but that the source of the respondent's gross income used as the measure of this tax was: (a) the procuring within Indiana of the raw cross-ties from the producers thereof (R. 44); (b) the acceptance of the Railroad's offer to purchase ties which was the respondent's action taken within Indiana giving rise to the contract of sale resulting in the receipts in question (see option: F. 8(a), R. 25; offer to purchase: F. 8(d), R. 38, ll. 26-41; acceptance by acquisition of ties: F. 8(d), R. 44, ll. 30-36); and (c) respondent's unconditional delivery within Indiana of the ties to the purchaser (R. 44, 48). No part of the measure was contractual compensation for any additional acts performed by the respondent in any other

state as a part of the sales contract. There was nothing, therefore, to apportion.

Pittsburgh Life and Trust Co. v. *Young* (1916), 172 N. C. 470, 90 S. E. 568 at 573.

This action seeks a refund. The primary burden of proof with reference to apportionment, if any is justified, is upon the respondent by virtue of its instituting the action as the plaintiff. In addition, the taxing acts itself places the primary burden of making the assessment upon the taxpayer, who consequently has the affirmative burden of claiming an apportionment if one is believed due or necessary, and the burden of making the proper apportionment so that the measure of the tax will embrace only receipts from a source or business activities within Indiana. One attacking the constitutionality of a tax upon the thesis that income is properly ascribed to income-producing activities carried on in other states should establish by virtue of its role in the litigation the amount of income which it claims is properly within the taxing jurisdiction of the second state. Then too, it is the plaintiff, not the defendant, in a refund case who has the peculiar knowledge necessary to establish the apportionment, so that the plaintiff correctly bears the burden of proof.

Significant it is that the respondent did not introduce evidence proving what part, if any, of the purchase price of the raw cross-ties was derived from sources outside of Indiana.

Underwood Typewriter Co. v. *Chamberlain* (1920), 254 U. S. 113 at 120, 121;

Bass, Ratcliff and Gretton, Ltd., v. *State Tax Commission* (1924), 266 U. S. 271 at 280-283.

Section 2 of the taxing Act automatically provides that a separation of income be made, as it includes within the

measure of the tax as applied to non-residents such as the respondent *only* that portion of the receipts attributable to business transacted within the state or sources there.

Sec. 2, Chapter 50, Indiana Acts 1933, p. 388 at p. 390:: 11 Burns Indiana Statutes Annotated, 1933 Ed., 64-2602:: Baldwin's Indiana Statutes, 1934 Ed., 15,982.

The tax here is not upon a unitary enterprise conducted in several states, but exclusively upon respondent's income derived from business completed in Indiana.

Four

The gross receipts which are used as the measure of the tax are derived solely from intrastate transactions, from which it follows that the Commerce Clause of the United States Constitution is not violated.

A. Goods bought in one state for transportation to another state in cases where title passes in the latter state constitutes interstate commerce in its simplest conception. Upon the same principle it is held that where there was a regular course of business contemplated by the parties which took the goods sold into another state as an essential part of the transaction, and where by mutual agreement such goods are put into the hands of a third person, a common carrier, for transportation to the latter state,—that in such case interstate commerce is involved. But, where the buyer accepts delivery and title upon its own property in the seller's state and the subsequent transportation is made via the buyer's transportation facilities, the transaction is intrastate notwithstanding the seller

may at the time have known of the course of business whereby the buyer was to make further transportation of such goods.

Superior Oil Company v. *Mississippi*, 280 U. S. 390, at pp. 394-395.

B. The transaction between the respondent and the railroad company resulting in the gross receipts (purchase price of cross-ties) was wholly intrastate. The transportation to Finney, Ohio, relied upon as establishing the claim of interstate commerce, was made by the railroad company over its own lines without the payment of freight or other charge after having first accepted title and delivery upon its own right-of-way, in Indiana, and for the sole purpose of having the cross-ties treated by the National Lumber and Creosoting Company. The transportation in such a case and for such a purpose is not interstate commerce.

Eastern Air Transport Company, Inc. v. *South Carolina Tax Commission, et al.*, 285 U. S. 147, at pp. 152-153;

Superior Oil Company v. *Mississippi*, 280 U. S. 390, at pp. 394-395.

C. The transportation by the railroad company of its own product via its own lines does not constitute interstate commerce; and it makes no difference how title was acquired so long as it was acquired by virtue of a simple intrastate transaction.

The Pipe Line Cases, 234 U. S. 548, at pp. 561-562.

D. That the property transported is for the ultimate use of the buyer who is also the carrier is to be considered

with other facts in determining whether interstate commerce is involved.

Eastern Air Transport Company, Inc. v. *South Carolina Tax Commission, et al.*, 285 U. S. 147, at pp. 152-153.

E. The intention and contemplation of the parties is wholly immaterial where the transaction is clearly intrastate. In other words, a transaction which is clearly intrastate is not converted into an interstate transaction by the intention of the parties to that effect.

Superior Oil Company v. *Mississippi*, 280 U. S. 390, at p. 395.

F. The "multiple taxation doctrine" has nothing to do with the *determination* of the question whether interstate commerce is or is not involved. On the contrary, it has to do with the question as to whether a given tax is a *burden* when interstate commerce has been otherwise made to appear. There is no legal objection to double taxation in different jurisdictions; in fact, double taxation in a legal sense does not exist unless the double tax is levied upon the same property within the same jurisdiction.

Ohio Tax Cases, 232 U. S. 576, at p. 593;

Wright v. *Louisville and Nashville R. R. Co.*, 195 U. S. 219, at p. 222;

Kidd v. *Alabama*, 188 U. S. 730, at p. 732.

V

ARGUMENT

Preliminary

The petitioners in this brief will present the questions raised in the order in which they appear in the petition.

One

The Taxable Event

The majority opinion of the Circuit Court of Appeals in stating the contentions of the parties as to what constitutes the taxable event used the following language:

> "It is contended by the plaintiff that the event was the receipt of gross income which occurred in Pennsylvania. If this position is sound, it is evident —in fact, not disputed—that the State of Indiana was without power to levy and collect the tax. It is defendants' contention as stated in their brief, that 'the thing which the Statute authorizes as the taxable event, the thing which was taxed, is the transaction which occurs within Indiana involved in one of two things, either doing business within the state or deriving income from a source within the State.' Under this theory, the gross income received in Pennsylvania is merely the measure fot the tax."

We agree with this statement respecting the contentions of the parties, and we agree also with the statement im-

mediately following to the effect that "under this theory," (referring to petitioners' theory) "the gross income received in Pennsylvania is merely the measure for the tax." Indeed, the statute very clearly states that the gross receipts in any event, are not themselves taxed but constitute the measure for the tax. Note the language of Section 2 of the Act wherein it is provided:

> "There is hereby imposed a tax, measured by the amount, or volume, of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided."...

If we can admit that a statute which is so clear upon the present issue requires construction in the technical sense, we perhaps can conceive the next statement of the majority opinion to the effect that "the respective contentions require a construction of the Statute relied upon as a measure for the tax" but we are wholly unable to bring ourselves in agreement either with the result reached by the majority opinion or the reasoning through which that result was reached.

Significant and important it is *that the Act itself designates,* in section 2, *the taxable event,* which in the case of the respondent, a non-resident (F. 1, R. 20, ll. 24-28), is the engaging in business in the state or deriving gross income from sources within Indiana. The exact language utilized by the Indiana General Assembly in so specifying the taxable event is:

> "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. *Such tax shall be levied* upon the entire gross income of all residents of the State of Indiana, and *upon the*

gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Sec. 2, Chapter 50, Indiana Acts 1933, p. 388 at p. 390.

It is apparent that the language particularly applicable to the respondent, a non-resident (F. 1, R. 20, ll. 24-28), is the italicized language which, telescoped, is as follows:

"Such tax shall be levied upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana but are engaged in business in this state, or who derive gross income from sources within this state."

The statutory language is plain, is clear, and is unambiguous. It requires no legal construction or interpretation. It establishes the fact that insofar as the Act applies to non-residents (of which the respondent is one), the taxable event is deriving gross income from business transacted in Indiana or from sources within the State of Indiana, irrespective of where the actual physical receipt took place.

Just what constitutes the taxable events under the Act has been commented upon by the Indiana Supreme Court in three of its decisions, and by the United States Supreme

Court in one of its decisions, and, as we shall show in every decision involving this particular Act, the Courts have been very careful to point out that there are two taxable events, i.e., one for residents, and a separate and distinct taxable event insofar as non-residents are concerned.

Every decision which has commented upon the taxable events under this particular statute has recognized as valid the foregoing claims with respect to what constitutes the taxable event, even including—we insist—the case of *Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, so much relied upon in the majority opinion of the Circuit Court of Appeals in this case. Before touching upon the Adams case, however, we desire to refer to the decisions of the Court of last resort in the State of Indiana on that subject.

We respectfully direct the attention of the Court first to the opinion of the Indiana Supreme Court in *Miles, et al.* v. *Department of Treasury* (1935), 209 Ind. 172 at 188, 199 N. E. 372 at 378-379, 101 A. L. R. 1357, which (in part) reads as follows:

> "*We conclude that the tax in question is an excise, levied upon those* domiciled within the state *or who derive income from sources within the state, upon* the basis of the privilege *of domicile or the privilege of transacting business within the state,* and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state. We feel that the weight of reason and authority sustains this view."

The Supreme Court of Indiana repeated this interpretation of the identical Act here under consideration in its

opinion in *Indiana Creosoting Co.* v. *McNutt* (1936), 210 Ind. 656, 663, 664; 5 N. E. (2d) 310 at 313, where it said:

> "* * * * The gross income tax is an excise tax, and is measured by the receipt of gross income. In the case of *Miles* v. *Department of Treasury* (1935) 209 Ind. 172, 199 N. E. 372, 379, 101 A. L. R. 1359, the court, in considering the Gross Income Tax Act, said (page 188): 'We conclude that the tax in question is an excise, *levied upon* those domiciled within the state or *who derive income from sources within the state, upon* the basis of the privilege of domicile or the *privilege of transacting business within the state,* and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, *or transact business under the protection of, the state.*'"

Parenthetically, it should be noted that while this case differs from the *Indiana Creosoting Company* appeal in that the plaintiff there was a resident of Indiana (5 N. E. (2d) at 311), while the present respondent is a non-resident (F. 1, R. 20, ll. 24-28), the two cases have points of similarity in that:

(a) in the *Indiana Creosoting* case

> "the book accounts were kept in Louisville; that the money received in payment of accounts was sent to the office in Louisville" (*i.e.*: from the Chicago office of the Chicago, Indianapolis and Louisville Railway Company), "and the bills for supplies and material were paid at the same place". (5 N. E. (2d) at 312),

while in this appeal the respondent receives the gross income from its Indiana business in Pittsburgh and deposits it there; and

(b) the Indiana Creosoting Company claimed to be engaged in interstate commerce although (as is the situation of the respondent) it was not obliged to ship the ties to points outside of Indiana but delivered the ties to the railway company at Bloomington, Indiana (5 N. E.. (2d) at 312), while in this appeal this respondent is not obliged to make delivery of the ties across state lines to the purchaser at points outside of Indiana, but actually made delivery at points of origin within Indiana (F. 9, R. 48, ll. 1-4).

Practically the same language, quoted herein from the *Miles* (209 Ind. 172 at 188), and the *Indiana Creosoting Company* (210 Ind. 656), cases, was repeated by the Indiana Supreme Court in *Storen, etc. et al.* v. *J. D. Adams Mfg. Co.* (1937), 212 Ind, 343, 7 N. E. (2d) 941 at 946. And as we shall hereafter show, the United States Supreme Court indicated that it recognized the Act's language defining the taxable event insofar as non-residents were concerned when it said:

> "* * * Section 2 imposes a tax ascertained by the application of specified rates to the gross income of every resident of the State *and the gross income of every nonresident derived from sources within the state.* * * *"
>
> *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307 at 308.

> "The tax is not an excise for the privilege of domicile alone, since *it is levied upon the gross income of non-residents from sources within the State.*"
>
> *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307 at 310.

The repeated determination of the Indiana Supreme Court with reference to the existence of two taxable

events; i.e., one for residents and another for non-residents, was confirmed by the opinion of the United States Supreme Court in the case of *J. D. Adams Mfg. Company v. Storen* (1938), 304 U. S. 307. At the outset we find from the statement of facts (304 U. S. at 308) that the appeal there considered differed materially from the situation here presented, since the J. D. Adams Mfg. Company was an Indiana corporation, while contrariwise The Wood Preserving Corporation is a non-resident of Indiana. (F. 1, R. 20, ll. 24-28).

But the United States Supreme Court in determining the *Adams* appeal indicated that it was aware of the Act's language with reference to the taxable event insofar as non-residents were concerned when it pointed out:

> "* * * Section 2 imposes a tax ascertained by the application of specified rates to the gross income of every resident of the state and the gross income of *every non-resident derived from sources within the State.* * * *"
>
> *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307 at 308.

> "The tax is not an excise for the privilege of domicile alone, since it is levied upon the gross income of *non-residents from sources within the State.*"
>
> *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307 at 310.

And th dissenting opinion concurred with the majority in this particular, utilizing the following language:

> "The Indiana statute of 1933 here invalidated imposes 'a tax, measured by the amount or volume of gross income, ... upon all residents of the State of Indiana, and upon the gross income *derived*

from sources within the State of Indiana, of all persons and . . . companies . . . who are not residents of Indiana, but are engaged in business in Indiana.'"

J. D. Adams Mfg. Co. v. *Storen* (1938), 304 U. S. 307; diss: at 316.

Section 2 of the Act in specifying that as to non-residents the taxable event is deriving gross income from sources within Indiana or engaging in business within the state is clear, unambiguous, and does not require construction or interpretation. It means precisely what it says. The earlier parts of section 2 had provided a method for the taxation of residents of the state. It was recognized, however, that there were many non-residents, both corporate and individual, who were doing, or would do, business in the State who, so far as those transactions were concerned, should be taxed in the same manner and to the same extent that residents of the state were taxed. The purpose of the last above-quoted language from the Act was very apparently to reach that class of persons or corporations who, although non-residents, were either doing business within the state or deriving gross income from sources within the state, irrespective of where the physical receipt of the gross income occurred.

The majority opinion in this case to support its construction of the non-resident provision makes the following statement:

> "It appears to us that the non-resident provision of the Act upon which defendants rely, was intended to apply to persons not legal residents of the State, but living, temporarily, or engaged in business in the State *and receiving income there.*" (Our italics).

But this is no justification for the construction which the Court has made. If this is all that the non-resident provision means then there was absolutely no reason for the non-resident provision at all. That is, from the draftsman's standpoint, they might just as well have been treated together. In other words, if the sole test was to be the locale of the actual physical receipt of the income, then all references within the Act to residents and non-residents, to engaging in business, or to sources of the income, were manifestly superfluous.

From the foregoing it is apparent that the construction of the Act adopted by the majority opinion in the instant case, runs counter to the authoritative decisions of the Indiana Supreme Court in three cases and the United States Supreme Court in the Adams case which was relied upon by the respondent in the Circuit Court of Appeals.

Attention is also directed to the result of this new construction of the Act by the Circuit Court of Appeals. It permits one whose entire income is derived from business done in the State of Indiana and the depletion of natural resources of that State, to escape taxation by arranging to have the actual physical receipt of the income, generated wholly from Indiana sources, to take place outside of the State.

Wisconsin v. J. C. Penney Co., No. 46 decided by United States Supreme Court, Dec. 16, 1940.

Two

The source of income derived from the sale of tangible property is the tangible property itself, and is not affected by the situs of bookkeeping, invoicing, or incidental office transactions which may have taken place in another taxing jurisdiction.

It is apparent that the decision of the Circuit Court of Appeals for the Seventh Circuit in this present case is in conflict with the decision of the Circuit Court of Appeals of the Fourth Circuit in the case of *Dravo Contracting Company* v. *James*, 114 Fed. (2d) 242), decided September 6, 1940. In this present case the Court holds that a sizable portion of the business affording the source of income was transacted outside the State of Indiana both before and subsequent to the actual delivery of the ties to the Railroad Company. The basis for this statement evidently is what had earlier been referred to, in the opinion of the Court involving the question of bookkeeping, invoicing, and matters of similar character. We contend that such matters are not to be considered in determining the question as to the source of the gross income. An examination of the case of *Dravo Contracting Company* v. *James, supra,* reveals very clearly that the Court in that case was excluding services of a much more applicable character in determining the source of the gross income which was the measure of the West Virginia tax. The Court in the *Dravo* case makes it very clear that a state may tax what is carried on within its borders measured by income received, although it may depend upon transactions extending beyond the state's borders. As was stated by the Court on page 247, 114 Fed. (2d) 247,

> "'The power to tax income derived from contracting within the state is not affected by the fact that materials for use under the contract may be brought from without the state, or that they may have been prepared by the contractor without the state for use under the contract.'"

Much less should the items of bookkeeping, invoicing, and office transactions be held to affect the question of the source of the income of a sale completed in a state other than the second state which was the situs of the bookkeeping and office transactions.

Three

No Apportionment Was Necessary

A. The Act provides a perfect method of separation.

The majority opinion of the Court ignores the fact that, insofar as non-residents are concerned, the Act provides that the tax is to be measured exclusively by receipts from transacting business within the State. The language applicable to the respondent reads:

> "Such tax shall be levied * * * upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in the state, or who derive gross income from sources within this state, * * *"

The foregoing language has been judicially interpreted to mean *that as to non-residents the tax is on the basis of the privilege of transacting business within the state.*

> *Miles et al.* v. *Department of Treasury* (1935), 209 Ind. 172 at 188, 199 N. E. 372 at 378-379, 101; A. L. R. 1359.

Thus construed, it is at once apparent that the portion of section 2 of the Act dealing with non-residents auto-

matically provides for an allocation of income *since it taxes only that portion of the income attributable to business transacted within the state.* The Act clearly indicates that non-residents are to pay *only* on that portion of their income which an apportionment indicates is allocatable to business transacted in Indiana. Incidentally, since the taxing act deals with *gross,* and not net income, it was unnecessary to resort to calculus or to an involved formula of allocation. In *gross* income taxation the limitation of the tax on non-residents to income attributed to business transacted within the state results in a perfect apportionment. The difference between net and gross income tax measures, insofar as allocation is concerned, is that in *net* income taxation the allocation computation necessarily starts off with a comprehensive aggregate of all receipts derived from every source and, therefore, includes amounts admittedly beyond the taxing jurisdiction of any single state. In gross income tax measures (such as the Indiana Act) usually the only amount utilized is limited to receipts derived from business transacted *in the state.*

This distinction has recently been recognized by the United States Circuit Court of Appeals for the Fourth Circuit in dealing with a similar question under a West Virginia statute, where the measure of the tax was gross receipts, as is the situation here. That court said:

> "The holding of the Hans Rees Sons case is that a state income tax upon a unitary enterprise conducted in several states is void if it allocates an unreasonable portion of the income to the taxing state. The tax here is not upon a unitary enterprise conducted in several states, but upon the business of contracting conducted in West Virginia, and

income derived from that business is properly subject to taxation by that state."

Dravo Contracting Co. v. *James* (1940), 114 Fed. R. 2d Series 242 at 246,—Cert. Den. Jan. 14, 1941.

The situation presently before this Court is similar, since no attempt is made by Indiana to impose a tax upon non-residents as a unitary enterprise, conducted in several states, but Section 2 of Chapter 50 of the Indiana Acts of 1933 strictly limits the income to be used as the measure of the tax to receipts derived from business activities forming a source of such income within the State of Indiana.

A comparison with the Indiana statute of the revenue measure in the case of *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, relied upon by the Court in the majority opinion, constitutes a perfect illustration of what we have just pointed out. Note the language of the North Carolina statute:

"Every corporation organized under the laws of this State shall pay annually an income tax, equivalent to four per cent of the entire net income as herein defined, received by such corporation during the income year; and every foreign corporation doing business in this State shall pay annually an income tax equivalent to four per cent of a proportion of its entire income to be determined according to the following rules:"

Necessarily, a net income taxing act requires an apportionment formula because it uses aggregate amounts from the entire unitary business. In the Indiana Act the basis of taxation is defined accurately and limited to that which is

derived from business within the state. No comprehensive aggregates of all receipts from all business in all of the states is utilized, or necessary,—hence no involved formula is required. This conclusion follows for two reasons:

I. The tax as applied to non-residents seeks to tax ONLY that portion of their income attributable to transacting business within Indiana,

Sec. 2, Chap. 50, Indiana Acts 1933, p. 388 at p. 390;

Miles et al. v. *Department of Treasury* (1935), 209 Ind. 172 at 188, 199 N. E. 372 at 378-379,

so that any receipts representing business activities outside of Indiana should be eliminated by statutory command.

II. Where words of general or broad import are used in a statute, the court will, by restrictive interpretation, construe them to apply only to cases clearly within the field of legislative control.

Japanese Immigrant Case, 189 U. S. 86, 101, 23 S. Ct. 611;

U. S. v. *Coombs,* 12 Pet. 72, 76, 9 L. ed. 1004;

Albany Co. v. *Stanley,* 105, U. S. 305, 26 L. ed. 1044.

Similarly, when a statute is broad enough to cover matters without the state, as well as within, and as applied to matters without the state it would be unconstitutional, the court may restrict its application to matters within the jurisdiction of the state.

Singer Sewing Machine Co. v. *Breckell,* 233 U. S. 304, 34 S. Ct. 493;

State v. *Peet,* 80 Vt. 449, 68 Atl. 661, 130 A. S. R. 998;

State v. *Clement National Bank*, 84 Vt. 167, 78 Atl. 944.

B. The petitioners were not required to bear the primary burden of proof with reference to the apportionment of income achieved by the application of the Indiana Act.

It is respectfully submitted that the statement contained in the majority opinion:

> "Nor do we think, as argued, that the burden is upon the taxpayer to make an apportionment. It would seem more reasonable to think that it is incumbent upon the state which seeks to impose the tax, to provide a method of determining that portion of the income derived from transactions occurring within the state,"

misconceives the nature of Section 2 of the taxing act, which provides that only the income derived from Indiana business or sources is to be used as the measure of the tax, but, more than that, it misconceives the nature of this action. It is important, then, to note that prior to the institution of this action the taxpayer had been granted a hearing before an administrative board, as provided by the statute, and that this board had determined that the amount used as the measure herein was derived from business activities carried on within the State of Indiana. The respondent then paid the tax and instituted this action seeking a refund, claiming in part that the determinations of the assessing authorities were erroneous. But the respondent did not offer any evidence to show what, if any, amount used as a measure of this tax was not properly allocated to Indiana business sources.

The majority opinion seems to indicate that the primary burden of proof is to be recognized as being upon the petitioners and not upon the respondent. We cannot agree with this. There would appear to be no reason why the

usual rules with reference to the burden of proof in civil cases should be abrogated in a case seeking the refund of taxes paid.

Nor do we believe that the decision of the United States Supreme Court in *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, cited in the majority opinion, sustains such a view. Conrariwise, the language of the Court appears to recognize that in the cases of *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, and *Bass, Ratcliff and Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271, the taxpayers failed in their attempts to invalidate the apportionment methods used for the reason that they did not offer proof that the application of the statutory method of apportionment had produced an unreasonable result. The Court then proceeds to point out that the *Hans Rees' Sons* case differs from the *Underwood* and *Bass* cases because the evidence which was lacking in the latter cases was present in the *Hans Rees' Sons* case, as witness the language of the Court at pp. 132 and 133:

> "We are unable to agree with this view. *Evidence which was found to be lacking in the Underwood and Bass cases is present here.* These decisions are not authority for the conclusion that where a corporation manufactures in one State and sells in another, the net profits of the entire transaction, as a unitary enterprise, may be attributed, regardless of evidence, to either State. In the *Underwood* case, it was not decided that the entire net profits of the total business were to be allocated to Connecticut because that was the place of manufacture, or, in the *Bass* case, that the entire net profits were to be allocated to New York because that was the place where sales were made. In both instances, a method of apportionment was involved which, as was said in the *Underwood* case, '*for all that appears in the*

> *record,* reached, and was meant to reach, only the profits earned within the State.' The difficulty with the evidence offered in the *Underwood* case was that it failed to establish that the amount of net income with which the corporation was charged in Connecticut under the method adopted was not reasonably attributable to the processes conducted within the borders of that State; and in the *Bass* case the Court found a similar defect in proof with respect to the transactions in New York." (Our italics.)

It is both significant and important that the respondent did not introduce evidence proving (or even attempting to prove) what part, if any, of the purchase price of the raw cross-ties was derived from sources outside of the State of Indiana. Yet it is essential that one attacking the constitutionality of a taxing act upon the thesis that it taxes income properly ascribed to income-producing activities carried on in other states, affirmatively establish the amount of income which is properly taxable in the sister state.

Underwood Typewriter Co. v. *Chamberlain* (1920), 254 U. S. 113 at 120, 121;

Bass, Ratcliff and Gretton, Ltd. v. *State Tax Commission* (1924), 266 U. S. 271 at 280-283.

There is not a scintilla of evidence in this Record establishing the proportion of respondent's income attributable to any state other than Indiana. The respondent (plaintiff below) did not even attempt to produce any evidence establishing what the apportionment it demands, if any, should be. Since the burden of proof was definitely upon the respondent to establish the amount or the proportion of its income attributable to Indiana and to each of the other states, the present state of the Record means 100% of the respondent's gross income here involved is attributable to its Indiana business.

Before leaving this branch of the discussion, we desire to call attention to one or two omissions appearing in the statement of the evidence in the majority opinion which may have some bearing upon the due process phase of the case. In the opinion, (R. 71) in referring to the respondent it is stated that the respondent "maintained no office in Indiana, but was qualified to do business in that state where it had a statutory agent for service of process"; but the opinion omitted to state, as appears from page 48 of the Record, that:

> "In addition to the agent maintained by plaintiff in the City of Indianapolis, Indiana, for the service of process, plaintiff during the years 1934, 1935 and 1936 normally had one agent or employee assigned to the Indiana territory who was engaged in the buying of ties and was responsible to the Marietta, Ohio, office."

Likewise there is omitted the further statement appearing on page 48 of the Record that:

> "Plaintiff's district manager of production and operation, with headquarters at plaintiff's Marietta, Ohio, office, made periodical trips to Indiana during said years to interview people with whom plaintiff did business in relation to complaints, giving them assistance, and other matters that were beyond the authority of the normal field man's scope."
>
> F. 11, R. p. 48.

Beginning with the last sentence on page 71 of the Record the majority opinion states as follows:

> "In response to this price circular the producers would notify plaintiff at its Marietta office by mail, telephone or telegraph of the quantity, type and quality of the ties they could furnish, as well as the nearest loading point."

Reference to page 44 of the Record we think shows that there should have been added the statement:

> "or plaintiff's agent would make such arrangement with producers in *Indiana.*"

C. The measure of the tax was derived in its entirety from an Indiana source, therefore, there was nothing to apportion.

The majority opinion states:

> "We have stated heretofore the facts concerning the transactions constituting the source of income and shall not repeat. It is sufficient to point out that a sizable portion of the business affording the source of income, was transacted outside the State of Indiana, both before and subsequent to the actual delivery of the ties to the railroad."

The majority opinion cites the decision in *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123 at 133. Reference to that authority indicates that the activities forming the basis of that allocation were revenue-producing activities exclusively. No expense items, or non-revenue producing activities, were mentioned or considered by the Court. This is precisely the rule for which the petitioners contend in this case: i.e., that the allocation of income is to be based upon the basis of activities which are revenue-producing in nature. All of the revenue-producing activities of the respondent in connection with the respondent's sale and delivery in Indiana of the ties to the Railroad took place in Indiana. Under such circumstances there was nothing to apportion.

It is submitted that the Circuit Court of Appeals in its majority opinion erred in holding and deciding that the income involved was not derived wholly from sources within the State of Indiana; that said Court erred in

holding and deciding that there was no provision in the Act for allocating the tax to the income derived from that part of the business transacted in Indiana, it appearing clearly that the Act itself furnishes a perfect allocation in that the measure used is limited to income of non-residents derived from business and/or sources in the State of Indiana; and finally that said Court erred in holding and deciding that the burden was upon the petitioners to produce evidence that no income was used as a measure except such as was derived from business activities or sources within Indiana.

Four

The Commerce Was Not Interstate and the Tax Is Valid

Two written contracts were introduced in evidence and appear as part of the findings. They may, for brevity of expression, be called the Central Creosoting Company contract and the Joyce-Watkins Company contract. The Joyce-Watkins Company contract is the only one of the two which contained any provision with reference to the sale and purchase of railroad cross-ties. It is not contended that this contract was executed in the State of Indiana, but it is contended that this contract as respects the sale and purchase of cross-ties is in the nature of an option and that the resulting contract of sale involving a transfer of property from vendor to vendee actually took place in the State of Indiana.

Reliance apparently is placed on the statement on page 29, lines 14 to 22, of the Record embraced in the findings to the effect that: "All ties supplied to the railroad company have been supplied under that contract," referring

to the Joyce-Watkins contract, but that does not suffice to show that the actual sale and transfer of property in the goods did not occur in the State of Indiana. The option granted in the Joyce-Watkins contract was, in effect, no more than an offer which did not actually culminate in a sale until after the cross-ties had been selected and accepted by the Railroad Company on its right-of-way in the State of Indiana. The goods were unascertained until the railroad inspector inspected them and selected them. Note the following from page 44 of the Record:

> "When the ties were ready at a loading point, an inspector of the plaintiff and of the Baltimore & Ohio Railroad Company would go to the loading point, and all ties accepted by the Railroad Company's inspector were loaded by the producer on cars of the Railroad. Ties rejected by the Railroad inspector were not loaded on cars or paid for by plaintiff."

In other words, title to rejected ties never passed from the producer to the respondent but title to those which were accepted by the Railroad Company did pass to the respondent in Indiana and thereupon immediately passed to the Railroad Company as a result of their selection and acceptance by its inspector. Under the Uniform Sales Act of the State of Indiana which has been in force since 1929,

> "Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained,"

with certain exceptions not material here.

> Burns' Indiana Statutes Annotated, 1933, Sec. 58-201.

To further emphasize the fact that the Joyce-Watkins contract was no more than an option, so far as the sale of cross-ties is concerned, note the following language, quoting from page 25 of the Record:

> "The Contractor agrees to sell to the Railroad all ties produced or purchased by it originating in territory from which ties in the usual course of business would be brought to the lines of the Railroad *to the extent that the Railroad may give orders to the Contractor for the purchase of such ties.*" (Our italics.)

But there was nothing in the contract which required the Railroad to order a single cross-tie from the contractor, as is clearly evidenced by the following language, quoting from page 26 of the Record, *viz:*

> "This contract shall not limit the right of the Railroad to purchase ties produced in territory adjacent to its lines or elsewhere *from others, nor require the Railroad to order ties from the Contractor except to the extent that it may see proper to do so.*" (Our italics.)

It should be noted, too, that the Contractor is not required to furnish ties to the Railroad except when the Contractor has produced or purchased ties originating in the territory from which in the usual course of business they would be brought to the lines of the Railroad.

In other words, under the Joyce-Watkins contract the Railroad Company had the right to order ties or *not* to order ties as suited its purpose, or even its whim and fancy, and so long as the Contractor did not produce or purchase ties in the designated territory, it had a similar right. The Record shows that when orders were made the respondent *acknowledged* same by its agents at Marietta, Ohio, and proceeded to buy cross-ties in the State of Indiana for the

purpose of filling the order. This was followed by an offer to sell to the respondent by producers in Indiana who made that offer by transporting the ties to the Railroad Company's right-of-way in Indiana where the purchase was made by the respondent and where the sale ultimately was made by the respondent to the Railroad Company. It is clear that the cross-ties were all produced within the State of Indiana and never left the State of Indiana until they were bought by The Wood Preserving Corporation in Indiana; (that is, The Wood Preserving Corporation received title in Indiana) and were again sold by The Wood Preserving Corporation in Indiana to the Railroad Company, which received title and took delivery in Indiana. No interstate commerce is involved in such a transaction. *The contract did not require interstate shipment of the ties, or any shipment whatsoever.*

Reliance apparently is placed upon that part of the Joyce-Watkins contract found at the top of page 23 of the Record, where the following language is used:

> "The Railroad agrees to deliver to the Contractor on cars at the Treating plant the ties and other forest products which it *desires* to have treated." (Our italics.)

Attention is called to the word "desires." It will be observed that the Joyce-Watkins contract deals with the subject of *treating* raw ties as well as with purchase and sale. The above language, however, is far from requiring the treatment of all ties bought by the Railroad Company. It simply provides that all ties which the Railroad Company *desires* to have the respondent treat are to be delivered to the plant by the Railroad Company rather than by the respondent. But such a transportation by the Railroad

Company of its own property for treatment by the National Lumber and Creosoting Co., was not interstate commerce. The transportation in such a case is separate and distinct from the sale which has been fully consummated by the passage of title and delivery to the Railroad Company on its own cars, on its own right-of-way in the State of Indiana. *The case is wholly unlike the case where the ultimate destination of the product as the goods of the buyer required delivery to the buyer across state lines. Here the delivery to the Railroad Company had been completed in Indiana, and the only shipment across state lines was for the purpose of having a service applied to the products already fully owned by the Railroad Company; and even that shipment was wholly under the control of the Railroad Company. There was no requirement created either by the contract, the character of the goods purchased, or the character of the purchaser that the ties be transported.*

The majority opinion seems to proceed upon the theory that there was an agreement supplemental to the two written contracts already referred to embodied in oral directions to the respondent that all ties originating at points on the railroad west of the Ohio River (including Indiana) should be shipped by respondent to Finney, Ohio. This, of course, was not a modification of the written contracts, and was not a contract at all, but is significant of the two positions which petitioners have taken, namely, that the railroad company had the right at any time to change the destination of the raw ties which were being shipped for treatment, and also that the only shipment across state lines was by the railroad company owner for the purpose of such treatment and not by the respondent, the extraordinary bill of lading to the contrary notwithstanding.

Under the facts in this case the place where title passes is important.

The form of the bill of lading, much like that in the case of *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, is not sufficient to make an interstate transaction of on which is purely intrastate. As already pointed out, title to the raw ties in this case passed to the Railroad Company in the State of Indiana, a fact which can not be erased by the form of the billing used. In this connection, we desire to discuss the case of *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, a case which we think the majority opinion fails to adequately appraise. In this case— i. e., the *Superior Oil Company* case—the oil company was a corporation created and doing business in Mississippi. It sold gasoline to packers in Biloxi, Mississippi, and delivered it to the packers' wharves in that state. The majority opinion seems to concede that the transaction was completed by this act of delivery notwithstanding the use of a bill of lading showing that the goods were to be transported and delivered to the packers at a point in Louisiana across state lines. This, in fact, is what the court held in the *Superior Oil Company* case, and we see no reason why the same reasoning should not apply to the present case. An examination of the case discloses that in the *Superior Oil Company* case a bill of lading was used very much like what is used in the present case, which recited that the oil was consigned to Gussie Fontaine Packing Company at Grant's Pass, Louisiana, via its own boat, Frank Louis, with the protective provision that the property remained the property of the oil company until it was delivered to the Gussie Fontaine Packing Company at Grant's Pass, Louisiana.

In the *Superior Oil Company* case the Court brushed this paper transaction aside with the statement, quoting from pages 394 and 395:

> "The document hardly can affect the case, because it is 'not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause'."

In other words, by the form of the bill of lading the parties sought to "build up" the theory of a delivery to the Packing Companies at Grant's Pass, Louisiana, thus requiring shipment across state lines, whereas in fact delivery had already been made at Biloxi, Mississippi.

How like the present case the *Superior Oil Company* case is. The Railroad Company received title in Indiana. It was at liberty to do what it pleased with the ties when so received, but whether it was or not, the subsequent transportation was in order that an additional service should be applied to the ties in the treating process. Clearly the shipment by the owner of goods across state lines for the purpose of having someone other than the owner render an additional service does not constitute interstate commerce. Of course the transportation itself was interstate, but the element of "interstate commerce" as between the seller and the buyer is wholly lacking.

In this connection, we think the Court in the majority opinion has misinterpreted the time sequence in stating that, "Here there is not even a suspicion of an effort to avoid taxation. In fact the same course of business had been followed by the parties continuously since a period

prior to the enactment of the Act in question." The proper chronology is:

1. The Act was approved on February 27, 1933. Chapter 50, Indiana Acts of 1933, p. 388.
2. The date for the taking effect of the assessment feature of the Act was May 1, 1933.
3. The Joyce-Watkins contract was assigned to the respondent on May [illegible], 1933 (R. 29).

The fact that the title to the cross-ties passed in the State of Indiana and that at the same time delivery was made to the Railroad Company on its cars in the State of Indiana, is significant because it shows that the sale by the respondent and purchase by the Railroad Company was completed in the State of Indiana.

In our further amplification of the above proposition we desire to call the attention of the Court to the fact that the delivery by the Railroad Company of the cross-ties at Finney, Ohio, was to the Creosoting Company's plant for the purpose of having the creosoting process applied. It was not the case, therefore, where ultimate delivery and passage of title to the Railroad Company was to take place in another state. The delivery and passing of title to the Railroad Company as well as physical possession had taken place already in the State of Indiana. *The only delivery which took place in Finney, Ohio, was the delivery by the Railroad to the Creosoting Company.* In this particular the case is entirely different from the *Dahnke-Walker Co.* v. *Bondurant* case and other similar cases where, notwithstanding delivery to a common carrier f. o. b. point of origin, such delivery is not conclusive on the question of whether the commerce is intrastate or interstate where it was contemplated by the parties that ultimate delivery *to*

the purchaser was to be made in another State. In the above case the plaintiff purchased grain in Kentucky for shipment *to its mill in Tennessee.* The Court looked beyond the initial delivery to the common carrier in Kentucky and found that the ultimate destination and delivery from the very first was the *plaintiff's mill in Tennessee.* The transaction there was held to be interstate commerce because the sale and purchase was not completed in Kentucky but actually involved a transportation of the property to the plaintiff *at its mill in Tennessee.*

In this case, even upon respondent's theory, it cannot be contended that ultimate delivery to the Railroad Company, the purchaser, was to be made at Finney, Ohio, or was in contemplation by the parties. *As a matter of fact, no delivery was made to the Railroad Company at Finney, Ohio, until after the treating was done and then a redelivery took place.* Delivery to it had been completed in Indiana from whence in its own cars, on its own right-of-way, it transported its own property to the Ohio plant for the creosoting treatment by the Creosoting Company, limited only to the stock "which it desires to have treated." It is important, therefore, that the title passed in the State of Indiana at which point the ties were loaded upon the Railroad Company's cars and at which point the Railroad Company received physical delivery.

The rule defining the limits of state taxation is not necessarily the same as where regulation alone is the object.

The majority opinion seems to hold the contrary. Since, however, the Supreme Court of the United States has so repeatedly indicated a different conclusion, we are constrained to point out again what the Supreme Court has said in the case of *Swift & Company v. United States,* 196

U. S. 375, and *Stafford* v. *Wallace*, 257 U. S. 495. In the first of these cases the Supreme Court said, quoting from page 400:

> "Moreover, the sales are by persons in one State to persons in another. But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States."

In the second case, quoting from page 525, the Supreme Court used the following language:

> "The other cases relied on by appellants are less relevant to this discussion than the *Anderson* and *Hopkins Cases*. *Some of them are tax cases.* As to them it is well to bear in mind the words of the court in the Swift Case (p. 400):
>
> "'But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States.'" (Our italics.)

Clearly the Supreme Court intends to imply that there is a difference between *regulatory* cases and *tax* cases, and that where *regulation* is the objective it may extend to transactions which, considered alone, are intrastate but when considered in their relation to other transactions they become interstate. On the other hand, the thought is that where *taxation* of some activity is the object, the taxation of activities which are purely *intrastate* will not be interfered with upon the basis of the commerce clause merely because, when considered in its relation to other trans-

actions, it might perchance be regarded as a step in a plan which is subject to *regulation*. Nor does the case of *Minnesota* v. *Blasius*, 290 U. S. 1, cited in the majority opinion, hold otherwise. It is quite true that the Court in its opinion in that case does not refer to the distinction; but more important than what the Court omitted to say is what the Court actually did. What the Court did, undoubtedly, was to give recognition to the difference by sustaining the tax.

Moreover, a transaction may be interstate commerce or intrastate commerce depending upon the person involved, as was said by the Court in the case of *United States* v. *Sutherland*, 9 Fed. Sup. 204 at page 207:

> "When a lumber merchant or any other type of merchant or one not a merchant sells a thing in the state of Missouri to a resident of Missouri, that transaction certainly is altogether intrastate. If the person to whom he sells is a resident of Iowa and will take the thing purchased to Iowa, the transaction between the vendor and vendee still is altogether intrastate. The transaction is completed when the sale is made. What the purchaser does with the thing bought certainly cannot affect the nature of the transaction between him and the seller. The purchaser indeed is engaged in interstate Commerce if he transports the thing bought to another state, but the seller is not. It is impossible to elaborate a truth so simple."

We think it is abundantly shown in this case that the measure of the tax is derived solely from an intrastate activity, and that the levy, using that basis, is valid.

On the grounds stated in the petition, and for the reasons more fully stated in the brief, it is respectfully

submitted that the decision of the United States Circuit Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX

Pertinent provisions from the taxing act involved:

Section 2 of Chapter 50 of the Acts of 1933:

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Section 6 (a) of Chapter 50 of the Acts of 1933:

"Sec. 6. There shall be excepted from the gross income taxable under this act:

"(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. There shall also be excepted from such gross income, salaries, pensions, and other emoluments paid by the United States of America or any of its agencies, and interest or other earnings paid upon bonds or other securities issued by the United States of America

or its agencies, to the extent that the State of Indiana is prohibited from imposing a tax upon such salaries, pensions, emoluments, interest and/or earnings, by the Constitution of the United States of America."